No. 79-464

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL DAVID OSTROW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
CARLETON D. POWELL
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-464

PAUL DAVID OSTROW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (Pet. App. 3a-16a) is unreported. The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1979, and a petition for rehearing was denied on August 21, 1979. The petition for a writ of certiorari was filed on September 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly refused to admit into evidence a hearsay statement of an unavailable witness.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of attempting to evade and defeat personal income taxes for the years 1972 and 1973, in violation of 26 U.S.C. 7201. He was sentenced to one year's imprisonment, all but two months of which was suspended, and three years' probation. The court of appeals affirmed (Pet. App. 1a-2a).

1. The government's proof of petitioner's unreported income consisted in substantial part of establishing expenditures of corporate funds of Ostrow Textile Company, Ltd. (OTC), and Plej's Rock Hill, Inc. (Plej), for petitioner's personal use –*e.g.*, construction of a home, his son's bar mitzvah and automobiles (A. 85-98).[1]

With respect to the corporate payments for construction of the home, the contractor testified that petitioner instructed her to furnish him with invoices and informed her that he would pay them directly (A. 391). Thereafter, the contractor submitted invoices to petitioner, who paid them with corporate checks, prepared by Segundo Martinez and signed by petitioner, which were drawn on OTC's and Plej's accounts (A. 944). These payments were later charged to corporate repair and maintenance accounts (A. 948). For the years in question, the evidence established that at least $104,000 of corporate funds were diverted to petitioner in this manner (A. 85-98). While corporate officer loan accounts were maintained in petitioner's name, none of the expenditures in question were charged to these personal accounts (Pet. App. 4a).

---

[1] "A." refers to the eight-volume Appendix filed in the court of appeals.

2. In July 1974, special agents of the Criminal Investigation Division (formerly the Intelligence Division) of the Internal Revenue Service began an investigation into petitioner's income tax liabilities. Petitioner's attorney, Jules Ritholz, informed the agents that any request to interview employees of OTC and Plej must be made in writing (A. 154). On April 25, 1975, pursuant to an Internal Revenue Service summons, the agents interviewed Segundo Martinez, the corporate comptroller (Pet. App. 4a), and obtained answers to certain questions. Ritholz, while continuing to represent petitioner, also represented Martinez at this interview (A. 43). While the agents had inspected some of the corporate records prior to the interview, they did not know how the payments on the construction of the home were reflected and had not reviewed OTC's purchase journal (A. 155; Pet. App. 10a). At the time of the interview, Martinez was not under investigation (A. 155; Pet. App. 1a-2a).

The questioning at the interview focused principally on the manner in which the corporate books were maintained (Pet. App. 4a-5a). Martinez stated to the agents that petitioner told him to prepare a list of the corporate payments made for his home and to charge the payments to his loan account. Martinez further stated that he had made the list but subsequently lost it and forgot to tell the people who prepared the tax returns about the payments (A. 60; Pet. App. 6a). When Martinez was asked whether petitioner had inquired after March 15, 1974, if the payments had in fact been charged to petitioner, or whether, after April 15, 1974, Martinez had told petitioner that the list had been lost, counsel objected and directed Martinez not to answer on the ground that the questions were outside the scope of the summons (A. 61, 64; Pet. App. 7a-8a).

On October 31, 1975, the agents again interviewed Martinez. At this interview, the agents, believing now that Martinez was also involved in possible criminal violations, informed him of his Fifth Amendment rights. Martinez invoked the Fifth Amendment and refused to answer any questions concerning the purported list of expenditures or the entries in the purchase journal of OTC (A. 156; Pet. App. 9a).

3. At trial petitioner contended that the fact that the corporate payments on his home had not been charged to his loan account, but rather were charged to the corporations, was due to Martinez's error. Martinez was unavailable as a witness at trial (Pet. App. 4a). Accordingly, petitioner attempted to offer into evidence the statement made by Martinez during the IRS interview pursuant to Fed. R. Evid. 804(b). The district court refused to admit the statement into evidence (A. 1146).

After the jury returned a guilty verdict, petitioner moved for a new trial on the ground that the court erred in excluding Martinez's statement. The district court denied that motion (Pet. App. 11a), explaining that the "circumstances prevented the Service from having a full opportunity to elicit the whole of the witness' testimony" as required by Fed. R. Evid. 804(b) (Pet. App. 10a). The district court pointed out that at the first interview Martinez refused to answer questions concerning events after March 15, 1974, and April 15, 1974. Martinez also refused to provide other requested information on the ground that he could not remember various facts concerning the charging of expenses to petitioner's loan accounts. The district court also noted that the agents did not have available all of the corporate records at the

time of the April interview and that, after they obtained the necessary records, further questioning was terminated by Martinez's Fifth Amendment claim (Pet. App. 10a).

ARGUMENT

1. Petitioner contends that the district court's exclusion of "reliable exculpatory evidence" (Pet. 7) interfered with the presentation of his defense. He also contends that the decision of the court of appeals conflicts with *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), *Pettijohn* v. *Hall*, 599 F. 2d 476 (1st Cir. 1979), and *United States* v. *Toney*, 599 F. 2d 787 (6th Cir. 1979). However, in each of the cases relied on by petitioner, the excluded evidence either bore clear indicia of reliability or could have been tested by cross-examination at trial. That is not the situtation here.

In *Pettijohn*, the testimony of a defense witness was excluded on grounds of relevance. The court of appeals held that the excluded testimony was relevant and should have been admitted into evidence. In the present case, in contrast to *Pettijohn*, the defense proffered no witness whose credibility could be tested through cross-examination at trial.

Chambers is similarly inapposite. In *Chambers*, the question presented was whether the defendant was denied a fair trial by the refusal of the trial court to allow him to examine his witness as an adverse witness and to introduce testimony of prior statements that contradicted the witness's testimony. The Court held that the Due Process Clause required the trial court to provide this opportunity to elicit the truth. Providing the defense with this opportunity, of course, opened the door for an equivalent examination of the witness by the prosecution. The Court also explained that the out-of-court statements of the witness were made "under

circumstances that provided considerable assurance of their reliability" (410 U.S. at 300), and it added that "if there was any question about the truthfulness of the extrajudicial statements" the witness was subject to cross-examination "and his demeanor and response[] [could have been] weighed by the jury" (410 U.S. at 301). In the present case, in contrast, there was no such possibility since the declarant was not present at trial.

Toney, like the present case, raised the question whether the trial court properly excluded an out-of-court statement of an unavailable witness. The Sixth Circuit held that the statement there involved should have been admitted because it was against the declarant's penal interest (599 F. 2d at 789-790) and therefore had sufficient guarantees of trustworthiness. There are no similar guarantees of trustworthiness associated with this statement, which tended to exculpate the declarant's employer while not incriminating the declarant.

2. There is no merit to petitioner's contention (Pet. 8-9) that the Martinez statement bears "every imaginable indicia of reliability" because the statement was "subject to thorough examination by the Government" and "constituted an admission of negligence and was therefore contrary to the interest of the declarant." As the district court found (Pet. App. 10a), the agents "were not permitted * * * to make any inquiries about conversations between Martinez and * * * [petitioner] after the subpoena cut-off date concerning the alleged list, its loss, and the lapse of memory [of Martinez] about charging the expenditures to * * * [petitioner's] loan account." Moreover, the district court properly pointed out that the agents did not have necessary corporate records at the time of the first interview. In the second interview,

after the records had been produced, Martinez's claim of the Fifth Amendment "frustrated further inquiry" (Pet. App. 10a; see also Pet. App. 2a).

In light of these facts, the conclusion of the district court (Pet. App. 10a) that the agents were "prevented * * * from having a full opportunity to elicit the whole of the witness's testimony" was entirely correct. Although petitioner suggests that the statement was against Martinez's interest because it could be construed as an admission of "negligence," we are aware of, and petitioner points to, no realistic possibility that the declarant's interests could be impaired by the statement. See Fed. R. Evid. 804(b)(3); see also Pet. App. 2a. Indeed, since Martinez was an employee of petitioner's corporation and his livelihood may well have depended on petitioner's good will, it seems likely that he had a substantial motive to lie in making the statements in question.

3. Petitioner also contends (Pet. 10-12) that the court's exclusion of the Martinez statement was erroneous under Fed. R. Evid. 804(b)(1) and conflicts with decisions of other courts of appeals.[2] Contrary to petitioner's claim, however, the district court's ruling was correct and there is no conflict.

---

[2]Rule 804(b)(1) provides for the admission of:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Petitioner argues that the Martinez statement would have been found admissible under the Tenth Circuit's decision in *United States* v. *Brown*, 411 F. 2d 1134 (1969). However, in *Brown* there was a "full exercise of an opportunity to examine the witness" (411 F. 2d at 1138), and there was "complete cooperation [on the part] of the witness." The witness "was admittedly under investigation as a prospective defendant * * * and thus had a lurking penal interest to protect but did not do so" (411 F. 2d at 1138). None of those factors was present here.

In this case, there was no "full exercise of an opportunity to examine the witness". The agents did not receive the witness's full cooperation and did not have an adequate opportunity to examine the witness because they were precluded from exploring the witness's credibility by petitioner's attorney (Pet. App. 10a). In addition, as pointed out by the district court (*ibid.*) and the court of appeals (Pet. App. 2a), the statement in question was not against any pecuniary or penal interest of the witness. Thus, the only similarity between this case and *United States* v. *Brown*, *supra*, is that in both cases the statements were given to agents of the Internal Revenue Service. This fact alone, however, does not justify admission of a statement. See 4 *J. Weinstein's Evidence*, para. 804(b)(1)[05], at 804-74 (1977).

California v. *Green*, 399 U.S. 149 (1970), does not suggest a different result. In *Green*, prior statements of a witness, inconsistent with his testimony at trial, were introduced for the truth of the matters contained in the statements. The question presented was whether the Confrontation Clause prohibited use of such statements

where the witness was available at trial. In the present case, in contrast, the question is whether there are sufficient indicia of reliability (including the opportunity for full cross-examination) to assure the trustworthiness of a hearsay statement of an unavailable witness. In *Green*, the witness was available for cross-examination at trial and had been fully examined in a prior judicial proceeding. No such opportunity for examination of the declarant was available here.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
CARLETON D. POWELL
Attorneys

DECEMBER 1979

---

[3]The other cases cited by petitioner (*Phillips* v. *Wyrick*, 558 F. 2d 489 (8th Cir. 1977); *United States* v. *Birnbaum*, 373 F. 2d 250 (2d Cir. 1967); *United States* v. *King*, 552 F. 2d 833 (9th Cir. 1976)) are equally irrelevant here because, in each case, the party opposing admission of the extra-judicial statement had a fair opportunity to fully examine the declarant, either at trial or in a prior proceeding.

DOJ-1979-12